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December 19, 2002

TN REGULATORY AUTHORITY  
DOCKET ROOM

Tennessee Regulatory Authority  
Attn: Sharla Dillon  
460 James Robertson Parkway  
Nashville, TN 37238

Re: Complaint of Ben Lomand Communications, Inc. against Citizens Communications  
Company of Tennessee, LLC d/b/a Frontier Communications of Tennessee;  
Docket No. 02-01221

Dear Ms. Dillon:

Enclosed for filing are the original and 13 copies of Ben Lomand's response to Frontier's Motion to Dismiss in the above-referenced matter. Thank you for your assistance. Please call if you have any questions.

Sincerely,



H. LaDon Baltimore  
Ben Lomand Communications, Inc.

LDB/dcg  
Enclosures

cc: Levoy Knowles  
James Dempster, Esq.  
Gilford Thornton, Esq.  
J. Michael Swatts

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# COMPLAINT OF BEN LOMAND COMMUNICATIONS, INC.,

REGULATORY AUTHORITY  
DOCKET ROOM

**DOCKET NO. 02-01221**

**CITIZENS COMMUNICATIONS  
COMPANY OF TENNESSEE LLC,  
d/b/a FRONTIER COMMUNICATIONS  
OF TENNESSEE.**

Complainant, Ben Lomand Communications, Inc. (“Ben Lomand”), hereby files its opposition to Citizens Communications Company of Tennessee, LLC, d/b/a Frontier Communications of Tennessee’s (“Frontier”) Motion to Dismiss. For the reasons set forth below, such motion should be denied.

Ben Lomand filed its Complaint against Frontier alleging that Frontier has engaged, and continues to engage, in discriminatory and anti-competitive practices in violation of state law and orders of the Tennessee Regulatory Authority (“TRA”). Ben Lomand alleges that Frontier’s tariff results in unjust discrimination, undue and unreasonable preference, and is unreasonably prejudicial in violation of Tenn. Code Ann. §§65-4-122(a)&(c) and 65-4-123. It is also alleged that Frontier’s tariff results in predatory pricing and violates other anti-competitive practices in violation of Tenn. Code Ann. §65-5-208(c). Furthermore, Ben Lomand alleges that Frontier’s

new service offerings are special contracts in violation of Tennessee law. Additionally, Frontier's tariff, Ben Lomand alleges, is unreasonable, unjust discrimination, and is unduly preferential in violation of Tenn. Code Ann. §65-5-204(a).

The tariff in question was filed by Frontier on April 11, 2002 (the "Tariff") to offer two new services to business customers in McMinnville and Sparta.

In response to Ben Lomand's Complaint, Frontier has filed a Motion to Dismiss. First, Frontier moves to dismiss by arguing that the Complaint was not timely filed. Frontier further moves for dismissal alleging that the TRA has previously approved promotional efforts by Citizens Telecommunications Company of Tennessee ("Citizens") in its McMinnville and Sparta exchanges. Furthermore, Citizens alleges that the tariff does not result in predatory pricing or other violations of Tenn. Code Ann. §65-5-208(c) and that the tariff is not a special contract and does not violate Tennessee law.

Contrary to Frontier's assertions, Ben Lomand's Complaint should not be dismissed, but instead, a contested case should be convened to consider the issues raised in the Complaint.

## **LAW AND ARGUMENT**

### **A. Ben Lomand's Complaint was timely filed.**

Frontier moves to dismiss the Complaint arguing that it was not timely filed. Frontier cites TRA Rule 1220-1-2-.02(4) which requires that objections to a tariff filing be filed no later than seven (7) days prior to the Authority Conference immediately preceding the proposed effective date of the tariff. This Rule sets a deadline for those who wish to challenge a tariff filing prior to its proposed effective date. This Rule does not preclude anyone from ever

challenging a tariff once it is on file, including, but not limited to, the discriminatory, unreasonable preference, and unreasonably prejudicial aspects of a tariff.

Under Tenn. Code Ann. §§65-4-122, 65-4-123, and 65-5-208, there is no statute of limitations for challenging any rate or charge as violative of such statutes. Ben Lomand is challenging the predatory and anti-competitive behavior of Frontier as evidenced by this Tariff. Such a challenge is not limited by TRA Rule 1220-1-2-.02(4).

If Frontier's argument was carried to its logical end, then the TRA could never review a tariff which has been challenged by a complainant outside of the seven day window prior to the TRA Conference preceding the tariff's proposed effective date. Adherence to Frontier's interpretation of the Rule would thwart the TRA's duty under Tenn. Code Ann. §65-4-123 to "protect the interest of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider .... "

Ben Lomand had no notice of the Tariff when it was filed, and was not aware of it until some of its customers, after being contacted by Frontier regarding the Tariff, inquired of Ben Lomand about the tariff and if Ben Lomand could match such rates. This situation could apply not only to a carrier such as Ben Lomand, but to end users of telecommunications services. For example, if end user "A" discovered that end user "B" has a lower rate due to a tariff filed, and such tariff had been in operation for some time, then end user "A" should not be precluded from filing a complaint with the TRA because the seven day window had expired.

TRA Rule 1220-1-2-.02(1) states that "the Authority may commence a contested case **at any time** with respect to any matter within its jurisdiction." (emphasis added). As stated above, the contention of Ben Lomand is that Frontier is engaging in anti-competitive practices, including

cross-subsidization, preferences, predatory pricing, and price discrimination, which are in violation of Tenn. Code Ann. §§65-4-122 and 65-5-201, and such behavior is in violation of the stated policy of the Tennessee General Assembly to “protect the interest of the consumers without unreasonable prejudice or disadvantage to any telecommunications service provider.” None of these statutes has a requirement that any complaint based on these statutes be brought within the seven day period of such Rule.

B. The TRA Order of April 24, 2002 pertaining to a specific promotion does not preclude consideration of Ben Lomand’s Complaint.

Frontier moves to dismiss the Complaint because the TRA has previously ruled that Citizens could offer limited promotional incentives in its McMinnville and Sparta exchanges. Frontier cites the TRA’s April 24, 2002 Order in Docket No. 02-00088 approving a Citizens tariff offering a promotion to customers in its McMinnville and Sparta exchanges. The promotion provided for a \$20.00 credit for customer referral and a “Win-back” promotion awarding credit to customers subscribing to Citizens’s basic local residential service. Frontier further cites two other approvals (Docket Nos. 00-000963 and 00-00965 approving other special promotions by Citizens offered to customers in the McMinnville and Sparta exchanges) as authority for the anti-competitive practices at issue in this Complaint.

Ben Lomand vigorously contends that these three Orders are not authority to dismiss this Complaint since this Complaint alleges anti-competitive practices in violation of Tenn. Code Ann. §§65-4-122, 65-4-123, 65-5-204, and 65-5-208. The cited Orders pertain to specific and

limited promotions, not to the Tariff at issue in this Complaint, and the anti-competitive practices also at issue in this Complaint.

Frontier alleges that the aforementioned Orders state that Citizens is facing stiff competition in the McMinnville and Sparta exchanges. However, the fact that there is competition in certain exchanges does not mean that a utility may violate the telecommunications law of the State of Tennessee, specifically Tenn. Code Ann. §§65-4-122, 65-4-123, 65-5-204, and 65-5-208.

Furthermore, since the issuance of the above-referenced orders, in July of 2002, the National Association of Regulatory Utility Commissioners, an organization in which the TRA is an active member, passed a "Resolution on Telecommunications Consumer Bill of Rights," which states in part, "Non-discrimination: Every consumer should have the right to be treated equally to all other similarly situated consumers, free of prejudice or disadvantage." The Tariff in question violates the letter and spirit of such resolution by denying those outside of the Sparta and McMinnville exchanges such preferential rates.

C. A contested hearing is necessary to determine if Frontier is engaging in predatory pricing or other violations of Tenn. Code Ann. §65-5-208(c).

Frontier alleges that the prices in the Tariff in question are cost-justified and that Ben Lomand did not allege that the Tariff prices are below the price floor set in Tenn. Code Ann. §65-5-208(c). Ben Lomand alleges that the Tariff violates such section in that it is in violation of cross-subsidization, price squeezing, predatory pricing, price discrimination, tying arrangements,

or other anti-competitive practices. A contested case is necessary to determine if the Tariff offerings are predatory pricing and anti-competitive.

- D. Ben Lomand reviews its allegation that Frontier's new service offerings are special contracts in violation of Tennessee law.

Frontier alleges that such Tariff is not a special contract in violation of Tennessee law. Ben Lomand renews its allegation in its Complaint that Frontier's offerings are special contracts in violation of Tennessee law. Ben Lomand alleges that the special rates offered by Frontier in McMinnville and Sparta exchanges depart from the requirement of uniform rates available to all customers and fixed by published tariffs and is in fact a special contract in violation of Tennessee law.

### CONCLUSION

In summary, Ben Lomand's Complaint should not be dismissed on the grounds set forth by Frontier, and accordingly, Frontier's motion should be denied.

Respectfully submitted,



H. LaDon Baltimore, BPR #003836

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*Counsel to Ben Lomand Communications, Inc.*

### Certificate of Service

The undersigned hereby certifies that on this the 19<sup>th</sup> day of December, 2002, a true and correct copy of the foregoing has been forwarded via first class U. S. Mail, hand delivery, or overnight delivery to the following.

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